1940

File No. Cr. A. Be

(K)

Legal DEPARTMENT Part-

A BRANCH

Criminal

Subject: K

Belgaum District.

Appeals against acquittals in Cr.
in Belgaum District.
No 82 of 1940 under sec 417

P. 13 F

~~K. Bhagwat~~

~~Sd/-~~

~~Sd/- Inspector Belgaum Distt~~

(For subsequent papers
see Part II)

File No. Cr. A. Bel. 82/50 Part I

Std. Scott. Slip 24 A—1626—1,00,000—6-49

417-A
Cr. A. Bel. 82
417-A

Judgment recorded by the High Court in Criminal Jury Reference No. 9 of 1950 in the Case of State vs. Ramu Shivram No. 1 and others.

The Government Pleader for the State.
Shri A.A.Mandgi Advocate for the accused.

Cor. Gajendragadkar and Vyas JJ.

22nd March 1950.

(Oral judgment:- Per Gajendragadkar J.):-

This is a reference made to us by the learned Addl. Sessions Judge, Belgaum, under Sec. 307 of the Cr. P. C. Eight persons were tried before the learned Judge on an alternative charge. The prosecution case against those 8 persons was that on the 29th Septr. 1948, at about 6-30 A.M. these people constituted themselves into members of an unlawful assembly in the Kondar field of the village Karajage and their common object was the commission of murder of Rasul Yakub Bitanakar. The charge against them was that in pursuance of this common object of the unlawful assembly which they formed, these persons who were armed with deadly weapons such as axes, spears and sticks committed the murder of the said Rasul by intentionally causing his death. They were thus guilty of the offence punishable under Ss. 148 and 302 read with sec. 149 of the I. P. Code. Alternatively they were charged with having committed an offence of murder in furtherance of the common intention and thus having made themselves liable to be punished under ss. 302 read with sec. 34 of the I.P. Code. The charge in respect of the offence under Sec. 148 was tried by the learned Trial Judge with the help of a Jury whereas the other charge under Ss. 302 read with sec. 149 or Sec. 34 was tried by him with the aid of Assessors. As regards the charge under Sec. 148 the majority verdict was against the accused. The Jury were divided by 3 against 2. As regards the charge under Sec. 302 which was tried by the Assessors,

the opinion

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of the assessors was similarly divided, three of the five being against the accused and the remaining two in their favour. The learned Judge considered the opinion of the assessors and proceeded to deal with the merits of the prosecution case. He came to the conclusion that the case against them as regards the said charge had not been proved. He accordingly acquitted them of the said offence. As regards the charge under Sec. 148, the learned trial Judge came to the conclusion that the verdict of the jury was perverse and opposed to the weight of evidence and that in regard to accused Nos. 3 and 8, in any event, it was clearly illegal. He has therefore made this present reference to us. There has been no appeal so far against the order of acquittal in respect of the charge under sec. 302 read with section 149 of section 34 and it is with the offence under section 148 alone that we are concerned in the present reference. (N.P.) Now the powers of this Court in dealing with the reference made under Sec. 307 have been recently considered by a judgment of the Privy Council in Ramanugrah Singh V. The King Emperor, 48 Bom.L.Reporter, P.768, Their Lordships observed that in dealing with a reference under section 307 of the Criminal Procedure Code, the High Court must only interfere with the verdict of the Jury, if it finds that the ends of justice require that the verdict should be set aside. If the evidence is such that it can properly support a verdict either of guilty or not guilty, according to the view taken of it by the trial Court, and if the jury take one view of the evidence and the Judge takes another, the verdict of the jury must prevail. On the other hand if the High Court considers that upon the evidence adduced in the case no reasonable body of men could have reached the conclusion arrived at by the jury or in other words if the High Court considers that the verdict

of the jury is perverse in the sense of being unreasonable or manifestly wrong or against the weight of the evidence, then the reference is justified and the ends of justice require that the verdict may be disregarded. Mr. Mandgi has contended that before we decide the first question as to whether the reference is justified or not we may have to consider the merits of the case to some extent, because Mr. Mandgi's case is that the majority verdict of the jury in this case is perverse and is obviously against the weight of evidence in the case. But in the present reference it seems to us that we need not proceed to examine this argument of Mr. Mandgi in great detail because we are satisfied that the verdict of the jury in respect of accused Nos.3 and 8 is clearly illegal. As I have already indicated, the charge against all to accused, including Nos. 3 and 8, is that they were members of an unlawful assembly and that each one of them was armed with a deadly weapon. The evidence against the accused Nos. 3 and 8 was that they were armed with sticks. We have no details about the nature of these sticks; how long they were, whether they were capable of causing any grievous hurt and it would appear from the charge that the learned Judge had explained to the jury that unless they were satisfied that the sticks which accused Nos. 3 and 8 were alleged to have taken with them were proved to be deadly weapons, accused Nos.3 and 8 could not be convicted under section 148. There is no doubt whatever that on the record there is no evidence to justify the assumption that the sticks alleged to have been taken by accused Nos. 3 and 8 were deadly weapons and yet three out of the five jurors have come to the conclusion that these two accused were armed with deadly weapons. The learned Government Pleader has taken us through the material record on this question and has fairly conceded that on the record as it stands this part of the verdict could not be sustained. The question which, therefore, arises before us is that if the verdict of the jury is found to be unsustainable as regards two out of ...

the eight accused, is it still necessary for the other accused to satisfy us that the verdict as against them is perverse in order to persuade us to go into the merits of the case. It seems to us that the verdict of the jury was given as one verdict against all the accused who were tried in a joint trial and we are satisfied that it would not be safe or proper to split up this verdict and say that the verdict as against accused Nos. 3 and 8 may be improper and illegal and the verdict as regards the rest would still remain intact. Hereagain the learned Government Pleader has been very fair and he has stated that inview of the fact that part of the verdict was found to be unsustainable, the reference must be taken to be justified and the present proceedings dealt with on that footing under section 307. That being the position, we must consider the facts of this case and answer the question as to whether the verdict is one which should be disregarded.

Now the facts giving rise to this prosecution can be briefly stated at the outset. Unfortunately this village of Karajage has been torn by parties and has witnessed murders from time to time. There are two parties in this village, one led by Habbuand the other led by Subrao. Subrao's party is known as Dhange. The complainant-Daval-and his father Gaibi belong to the party of Habbu. Rasul is the brother in-law of Daval and is married to Daval's sister. In 1944 Habbu was murdered and amongst the persons charged with this murder, were accused Nos. 1,2 and relatives of accused Nos. 3 and 6. These persons were acquitted at the trial. In 1947 Subrao who was the leader of the rival party was murdered and several persons were charged amongst them were Bhima, Gundu, Mira, Bala Rama Naik. These three were charge-sheeted but according to the Police Officers Mira and Ramji who were also involved in the murder of Subrao were absconding and they were not arrested until July 1948. The present accused are the members of Dhange party. The prosecution

case was that the present accused suspected that Daval and Rasul were helping Mira and Ramji when they were in hiding. They thought that Rasul and Daval used to supply bread to Ramji when he was absconding and according to the prosecution Ramji's son Mallappa wanted to assist the accused in the matter of furnishing surety in order that the accused may be released on bail. Gaibi went to Gokak on the 26th September 1948 with this object. It is alleged that Accused No.1 questioned Daval about his conduct kon his part in assisting Ramji who wanted to be released on bail. Daval refused to be intimidated and actually an attempt was made to give surety for Ramji though that attempt turned to be infructous It was as a result of this attempt on the part of Daval and Rasul, that the accused felt infuriated and decided to teach Daval and Rasul a proper lesson. The prosecution case is that the murder of Rasul on 29th September 1948 was the result of this plan. On this day, which was Wednesday, early in the morning Rasul and Daval were sitting just in front of the hut near the central post and were enjoying a smoke. This was near the field which belonged to Gaibi. About Half an hour after sun-rise one Jotiba Pawar came to the field and asked for permission to take castor leaves for feeding his sheep. He was given this permission and he went to the field to take the leaves. About this time all the eight accused came on the scene armed with sticks, axes and spears and attacked the two persons Daval and Rasul who were sitting near the hut . They exclaimed that they had found both of them and by their doing so, they showed that they were determined to dispose of both of them. Daval, however, managed to escape and Rasul was left to face the fury of all of them. Accused No.1 gave an axe blow on the arm of Rasul, No.2 hit him with a spear and No.1 again gave another axe blow as a result of which Rasul fell to the ground. The prosecution case is that all the eitht accused took part in beating Rasul. Meanwhile Daval had escaped and hid himself into the tag plantations

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behind the hut. After the assailants had departed he came back to the hut. He found two persons in the hut. It was also discovered that the Patka of Accused No.3 and the axe of accused No.4 had been left behind on the ground. According to the prosecution this assault had been seen by Daval and by two witnesses Jotiba Powar and Jotiba Kurade. These three had a talk and Daval went to the Police Patil to give information about this affair, and the two witnesses went away thereafter. Vardi was given in writing to the Police Patil whereupon the Police patil sent his first information report. This report started the investigation proceedings and in the end a chargesheet was levelled against all the accused as I have already mentioned . The prosecution case thus rests on the evidence of Daval, Jotiba Powar and Jotiba Kurade and another witness Dastgir Mirasab Mirakhan who was cultivating the neighbouring field and who saw the accused departing after they had committed the offence. Now the first thing on which the prosecution may rely is the existence of motive. The learned Additional Sessions Judge was not satisfied with this evidence because he thought the documentary evidence about the surety-ship proceedings should have been produced before the Court. But leaving this technical consideration aside, we are prepared to assume that the prosecution have proved the existence of motive

While dealing with the evidence of this case, we think we would be justified in taking into account the fact that the accused belong to a hostile party and that they were angry with Rasul and Daval for their conduct in helping the two absconding offenders Mira and Ramji and that as a result of the suretyship proceedings on the bail application of Ramji, they were angry with both Daval and Rasul. It is hardly necessary to emphasise that the existence of motive cannot take the place of substantial evidence in a criminal trial. When you say that the proof of motive makes the prosecution story probable, you have said

everything about the motive and its place in a criminal trial. The prosecution must still cover the whole ground by proof or evidence against each one of the accused and if the evidance is weak, it would not be open to them to seek to make it stronger by relying upon the existence of motive. That being so, we must consider whether the evidence on which the prosecution case was based was such on which no body of reasonable men could have come to the conclusion that the guilty of the accused was proved. Now the first witness is the complainant Daval himself. He refers to the prosecution case in detail. He says that he and Rasul were having a smoke in the early hours of Wednesday, when the crowd came he took fright, that he managed to escape. Even so he saw the assault and that all the eight accused took part in this assault. According to this witness as soon as the assault was over, he returned to the hut and found two Jotibas with whom he had a talk. Then he went to the Police Patil. This witness stated that when he went to the Police Patil the Police Patil asked him to give him information in writing . He therefore went to Krishna Kulkarni and asked him to reduce this information to a document and presented this document to the Police Patil at about 9-30 a.m. that morning. The Police Patil seems to corroborate this evidence and he says that after he received the complaint in writing he sent his own covering report at about 11 a.m. Now two questions arise on this information and complaint. The first is why Daval took more than 1½ hour to file his complaint in writing. The incident took place at about 6-30 a.m. in the morning and according to Daval after the incident was over he told the two Jotibas that he was going to the Police Patil. An attempt has been made both by Daval and the Police Patil to explain the delay in filling the complaint in writing by sugesting that Daval made a verbal report to the Police Patil immediately after the offence but since the Police Patil insisted upon a report in writing one was made at about 9-30 in the morning. It

is remarkable that this important fact was not mentioned either by Daval or by the Police Patil in their statements before the Police and that makes the whole story very suspicious. In that view the delay made by Daval in filing the first complaint remains unexplained. But that is not all. What is more important is the thing that though Daval saw the two Jotibas near the corpse of Rasul and though he was told that the two of them had witnessed the whole assault, Daval does not mention their names either in the complaint exhibit 7 nor does he mention them in exhibit 21, which is the Police Patil's report. Column 5 of this document has to mention the names of the accused and the witnesses who are able to identify. In this column all the eight accused are mentioned. Daval mentions himself alone as the Witness of the offence. It is impossible to believe that if Daval had known that two other witnesses had seen the assult and in fact if they had told him about it themselves, that he would forget to mention their names at the earliest opportunity. It is obvious that members of both the parties in this village are quite familiar with the procedure, in regard to murder trials. This is by no means Daval's first experience of such a case. But apart from that the Police Patil himself must undoubtedly have asked Daval whether any one else besides himself, had seen the assault and yet the two witnesses who had told Daval that they had seen the assault, are not mentioned in this document. Then it is also highly improbable that if Daval ran out for life, he should have waited to see how the assualt actually developed. On the other hand it is equally improbable that if all the eight assailants who were in very large number as against the two victims, should have let Daval go without assaulting him. If the prosecution's plea as to the existence of motive is to be believed, the fury of this crowd should have been addressed to Daval in preference to Rasul. But far from doing so, they allowed Daval to escape into safety and Daval had the courage even in that moment to see what each one of the accused was doing to Rasul whom he had left alone. This part of ....

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the story is highly improbable. Daval stated in his evidence that he pointed out to the police the traces of his approach in the plantations. There has been some evidence that it had rained the previous day and the learned Judge points out that if traces were left by Daval, it is surprising that no Panch Nama was made about these traces. Then there is another point which affects both Daval and Jotiba Pawar and that is the suggestion that Jotiba wanted castor leaves. Early morning he went to the field of Daval and Rasul and asked for their permission to take the leaves. Jotiba admits that these leaves were available in plenty in the fields nearabout the village. He gave an explanation for his travelling this long distance on this eventful morning. He says that he had already taken away the leaves from the neighbouring fields and did not want the owners of those fields to believe that he was drawing on their generosity far too much. This explanation is utterly worthless, and this explanation is given not only by Jotiba but by Daval himself thereafter. If the explanation is worthless since it is given by both the witnesses it introduces an infirmity in their evidence. Besides, while recognising the existence of motive against the accused in this case, we cannot ignore the same motive on the part of Daval. There have been feuds in this village. If one party is committing the murder of the leader of the other and the foul murders are committed with tragic regularity, it is impossible to believe Daval's evidence without corroboration. Reading the whole of Daval's evidence, we are satisfied that it is very doubtful whether he was present on the scene at all. That in our opinion really gives the explanation as to the delay in the First Information. Rasul was cultivating this field belonging to his father-in-law. It may be that some people murdered Rasul in that field. Daval got this information much later and that is why he could not go to the Police Patil to file the complaint earlier than 9-30 that

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morning .That being our view about the evidence of Daval, we cannot possibly hold that the prosecution case is provedx by his evidence. That takes us to the evidence of the two witnesses Jotiba Pawar and Jotiba Kurade. Jotiba Pawar is the person who wanted the castor leaves and he comes and asks for permission and starts his work when the assault takes place and he sees what is happening. According to the prosecution case, accused Nos. 1,3,5 and 6 were armed with axes and 2 and 7 with spears and 3 and 8 with sticks. The prosecution case further is that accused Nos. 1 and 2 gave two blows each to Rasul and after he fell down each one took part in beating him. Now this assault is described by both the Jotibas and it must be stated in favour of the prosecution that the account that they gave is on the whole consistent. But there are some points of difference. For instance the assualt took place on Rasul outside the hut. That is the case of both the witnesses and yet the record gives no satisfactory explanation as to how Rasul was taken inside the hut and as to how he was found covered under a Cambal. Whether Rasul had put on a shirt or not is another point of difference on which the two witnesses differ. One says that he had no clothes while the other says that he had a shirt. Whether Jyoti Powar took steps to remove Rasul from the place where he was lying is a matter again on which two witnesses do not agree. The learned Government Pleader has argued that those are matters of detail. That in our opinion is true but when the evidence relates to a few details about the assault it is legitimate for the defence to put these questions in order to suggest that these broad facts would not be differently stated by the two witnesses unless it be that one or both of them were not present on the scene. Looking at the evidence of these two witnesses from this point of view, it ~~evidence of these two witnesses from this point of view~~ seems to us that there is considerable force in the contention of Mr.Mandgi that in all probability these witnesses did not see the assault and Mr. Mandgi adds that that alone

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can be the reasonable explanation as to why their names are not mentioned by Daval before the Police Patil when he made his complaint and when he made his statement in exhibits 6 and 7. Some suggestion has been made to both the witnesses that they are partisans and though this suggestion cannot be ignored, we must point out that they are not as much of partisan witnesses as Daval for instance. But that is giving these witnesses a compliment only relatively. It appears that they did belong to the faction of the deceased and though they cannot be as much interested in the affairs of these parties, they cannot certainly claim to be independent or impartial witnesses. Jotiba Powar stated that there was no cattle in the hut whereas according to Daval there was a pair of oxen in the hut. This again is a matter of detail but such details have got to be considered in deciding whether the witness was present on the scene as he claims. We are satisfied that it would be impossible to believe the evidence of these two witnesses and in appreciating their evidence, the fact that their names were not mentioned by Daval cannot in our opinion be overlooked. In offences of murder, it is well-known that the person giving the first information report takes care to mention all the witnesses of whom he is aware, It cannot possibly be urged in the present case that Daval was not aware of these two witnesses. In fact he told them that he was proceeding to the Police Patil and if that is so, it is significant that he fails to mention these two names before the Police Patil. Then we have the evidence of one Dastgir Mirasab Mirakhan who is supposed to have seen the accused running away after the assualt. He says that he was cultivating the adjoining land & he saw all the eight accused running away. The extraordinary feature of the evidence of this witness, however, is that he took care not to recount what the accused were carrying in their

hands but what the two accused were not carrying while they were seen running away. He says that accused No. 4 was not carrying the axe and accused No. 5 was not carrying the Phatka and this he must say evidently because the prosecution case was that on the scene of offence an axe belonging to accused No.4 and Phatka belonging to accused No. 5 were found. No attempt has been made to prove this fact but that did not deter the witness from saying that though he was the rest of the accused, he noticed only two facts that accused No.4 did not carry the axe and accused No.5 did not have a Fataka on his head. It seems that the evidence of this witness is utterly worthless and no Court can act upon it. He is besides shown to be a partisan witness. He is brother of Gundu who has been convicted in Sultanbhai's case and although he claims to be cultivating the adjoining land, beyond his bare word, there is no evidence in support of this fact. Even according to him, he saw the accused from a distance of fifty cubit and yet he gives a detailed description of these accused persons. Having regard to this feature of this evidence, we do not think any importance can be attached to this evidence. That in fact is the whole of evidence on which the prosecution based their case There is another point which is to be considered in dealing with this evidence.

The Medical evidence says that the deceased had 8 injuries and on this medical evidence it is impossible to believe that the persons who carried sticks were party to the assault. There is no contusion and no abrasions on the person of the deceased mentioned in the medical evidence. Even the spears are not very much in evidence unless it be assumed that the spears were used obliquely. All the injuries are incised wounds. These injuries prima facie would suggest that the victim was lying down when the assault took place. There are two incised wounds on the right arm, two on the right chest and similaly two on the left chest and the left arm respectively

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If all the eight persons had taken part in beating the deceased it would probably have left a larger number of injuries on the person of the deceased and as I have just mentioned above The beating by sticks is not evident from the medical evidence at all. That being so, Mr. Mandgi is justified in contending that the medical evidence does not corroborate the prosecution case and is partly inconsistent with that case.

Having regard to this state of record, we are satisfied that the majority of the jury have returned the verdict which is opposed to the weight of evidence and it must be characterised as being preverse. It is not a unanimous verdict either. Out of the five jurors, three were of the view that the offence had been proved while two took a contrary view. It is true that the verdict of the jury should normally pr-evail and it if it was a case where that view was possible, we would have certainly hesitated in interfering with their view. We had to consider the evidence in this case because in respect of accused Nos. 3 and 8, the verdict was cle-rly illegal, and as I have already mentioned if a verdict was illegal in respect of 2 out of the 8 accused, we had to examine the whole case for ourselves. In fact the learned Government Pleader has fairly conceded that in law, it would not be proper to split up the verdict of the jury and say that the case should be opened in appeal only in respect of two accused and not the rest of the accused. That being the position, we must hold that the learned Judge was right in making the reference saying that the verdict of the jury was perverse. In that view, we must come to the conclusion that the prosecution has failed to prove their case against the accused in respect of the offen under section 148 of the Indian Penal Code . The result is that the reference is accepted and the accused are ordered to be acquitted and discharged.

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B.B.P.